JAYATUNGA
v.
THE ATTORNEY-GENERAL AND ANOTHER

SUPREME COURT
FERNANDO, J.
ISMAIL, J. AND
YAPA, J.
SC APPEAL NO. 42/2001
HC PANADURA NO. 4/99
MC PANADURA NO. 20748
18 JANUARY, 2002

Criminal Law – Three accused jointly charged for offences under sections 316 and 317 of the Penal Code – Effect of acquittal of the 2nd accused on the conviction of the 1st accused apparently on the same evidence – Effect of Magistrate's failure to consider the alibi offered by the 1st accused.

The 1st accused (the appellant) and the 2nd and 3rd accused were charged jointly before the Magistrate on the basis of common intention with offences under sections 316 and 317 of the Penal Code. The virtual complainant was one Abeydheera. The other witness to the incident was his aunt Nancy Nona who with the help of Abeydheera was attempting to pluck a jak fruit. The prosecution case was that at that stage, 3rd accused arrived and told them not to pluck jak fruits as they did not own the jak tree. At that stage the 2nd accused arrived with a club and struck a blow on the arm of Abeydheera. Next the appellant came with a *Kathy* and struck Abeydheera causing a grievous injury. The medical evidence described the cut injury as grievous.

The defence of the appellant and the 2nd accused who testified at the trial was an *alibi*. The 3rd accused said that when she objected to the plucking of jak, Abeydheera went to his house and returned with a sword. In self defence she held on to the sword when both of them fell and she sustained injuries. She could not explain the injury sustained by Abeydheera.

The Magistrate convicted the appellant on both counts. The 2nd accused was acquitted on the 1st count (section 317, causing grievous hurt with a dangerous weapon) but he was convicted on the 2nd count (section 316 causing grievous hurt). The 3rd accused was acquitted on both counts. On appeal, the High Court acquitted the appellant on the 2nd count but affirmed his conviction on the 1st count; and acquitted the 2nd accused on the 2nd count. On appeal to the Supreme Court –

Held:

(1) The acquittal of the 2nd accused on count 2 did not vitiate the conviction of the appellant on count 1 on the evidence of the same witnesses as it appeared that the acquittal of the 2nd accused on the 2nd count was not based on the ground of credibility of witnesses but on the absence of injury caused by the alleged blow with a club. There had been some doubt in the mind of the High Court Judge whether in those circumstances the charge under section 316 was established. However, in the absence of evidence of a common intention, the High Court Judge could have found the 2nd accused guilty of the lesser offence under section 314.

(2) The failure of the High Court Judge to give due consideration to the defence evidence is fatal to the conviction fo the appellant.

Cases referred to :

1. *The King v. Tholis Silva* – 30 NLR 267.

2. *Chandrasena and Others v. Munaweera* – (1998) 3 Sri LR 94 (CA).

APPEAL from the judgment of the High Court.

Ranjith Abeysuriya, PC with *Sharmanie Gunaratne* for appellant.

M. R. M. Hamza, State Counsel for Attorney-General.

Cur. adv. vult.

February 25, 2002

HECTOR YAPA, J.

The accused-appellant was charged along with two other accused in 1
the Magistrate's Court of Panadura under two counts. The first count alleged that on 21. 02. 1993 these accused voluntarily caused grievous hurt to Jayantha Abeydheera with a *katty* and thereby committed an offence punishable under section 317 read with section 32 of the Penal Code. In the 2nd count it was alleged that in the course of the same transaction they voluntarily caused hurt to the said Jayantha Abeydheera with a club and thereby committed an

offence punishable under section 316 read with section 32 of the Penal Code. After trial the learned Magistrate convicted the accused-appellant on both counts. The 2nd accused was acquitted on the 1st count and was convicted on the 2nd count. The 3rd accused was acquitted on both counts.

Thereafter, the following sentences were imposed on the accused-appellant. On the 1st count he was ordered to pay a fine of Rs. 1,000, with a default term of three months' imprisonment. Further, he was sentenced to a term of six months' rigorous imprisonment which was suspended for a period of three years. On the 2nd count he was ordered to pay a fine of Rs. 1,000 with a default term of three months' imprisonment. The 2nd accused who was convicted on the 2nd count was ordered to pay a fine of Rs. 1,000 with a default term of 3 months' imprisonment.

The accused-appellant and the 2nd accused appealed to the High Court from the said convictions and sentences. The learned High Court Judge after hearing the appeal found the accused-appellant guilty only on the 1st count and thereafter ordered him to pay a fine of Rs. 2,500 and sentenced him to a term of 6 months' rigorous imprisonment which was suspended for a period of 5 years. The 2nd accused was acquitted on the 2nd count.

The accused-appellant lodged an appeal in the High Court against the said conviction and sentence and sought leave to appeal to the Supreme Court. The learned High Court Judge granted leave on the following questions of law :

(i) Whether the accused-appellant should have been given the benefit of a reasonable doubt that arose in the prosecution case having regard to the strong evidence given by the accused.

(ii) This being a criminal case, whether the defence evidence should have been subjected to evaluation as required by law.

The case for the prosecution rested on the evidence of two eye-witnesses, namely the injured Jayantha Abeydheera and his aunt Nancy Nona. According to their evidence on the day in question, while Nancy Nona was plucking jak fruits, the plucking stick (*kekka*) got stuck and therefore she had sought the help of her nephew Jayantha Abeydheera to recover the plucking stick. When her nephew was attempting to free the entangled stick, the 3rd accused had come there and told them not to pluck jak fruits as they (witnesses) did not own the tree. At that point of time, the 2nd accused had come armed with a club and struck a blow which alighted on the arm of Abeydheera. Immediately thereafter, the accused-appellant had come armed with a *katty* and struck a blow on Abeydheera causing grievous injury to his forearm. According to the medical report marked P1, there was a cut injury on his left forearm which was described as a grievous injury.

When the defence was called the accused-appellant and the other two accused gave evidence. The accused-appellant and the 2nd accused in their evidence took up the position that they were not at the scene when this incident took place and that they came to know about it later. According to the evidence of the 3rd accused, when Abeydheera (injured) and Nancy Nona came to pluck jak fruits from a tree which was co-owned, she (3rd accused) had told them not to pluck any jak fruits. At that stage Abeydheera (injured) had run to his house and had come armed with a sword. Fearing that he would attack her, she had held on to the sword, when both of them fell and as a result she sustained injuries. However, she was unable to say whether Abeydheera had suffered any injury.

At the hearing of this appeal, learned President's Counsel for the accused-appellant made the submission that the acquittal of the 2nd accused by the learned High Court Judge necessarily cast a doubt on the credibility of the two prosecution witnesses who stated that the 2nd accused had dealt a blow on the injured Abeydheera with a club and the blow alighted on his arm. Further, it was these two

witnesses who deposed to the fact that the accused-appellant inflicted the cut injury on the arm of the injured Abeydheera. Therefore, counsel contended that when the High Court Judge declined to act on the evidence of these two prosecution witnesses with regard to the alleged club blow by the 2nd accused, their evidence lost its cogency and in the result such evidence should not have been used to base the conviction of the accused-appellant. However, a close examination of the reasoning of the High Court Judge would show that his decision to acquit the 2nd accused was not on the basis that he disbelieved that part of the evidence given by the two witnesses, but for two other reasons. Firstly, in view of the evidence of the injured, who stated that he received no injury as a result of the club blow given by the 2nd accused. Secondly, there was no medical report before the Court to show that any injury had been caused as a result of the said club blow. In other words, there has been some doubt in the mind of the High Court Judge on the question whether there was any injury caused as a result of the club blow to establish the second count under section 316 of the Penal Code. It may be that the club blow was a light blow or that the said club blow had not properly alighted on the body of the injured so as to cause any injury. Hence, the learned High Court Judge has concluded that the material was not sufficient to establish the 2nd charge against the accused-appellant and the 2nd accused. However, in the absence of any evidence to establish a common intention in this case, the learned High Court Judge could have found the 2nd accused guilty of the lesser offence of causing hurt under section 314 of the Penal Code, since it was the evidence of the injured Abeydheera that the club blow of the 2nd accused caused him bodily pain even though there was no injury as such. Under these circumstances, it cannot be said that the High Court Judge had disbelieved the evidence of the injured Abeydheera and his aunt Nancy Nona, when they said that the 2nd accused attacked the injured with a club. The learned High Court Judge has thought it best to give the 2nd accused, the benefit of the evidence given by the injured who said that even though the club blow alighted on his hand he was not injured and the fact that there was no medical

evidence to support a club injury under section 316 of the Penal Code. However, he has failed to address his mind in regard to the possible lesser offence that has been disclosed. For the above reasons, I am unable to agree with the submission of learned President's Counsel that the learned High Court Judge had disbelieved the two prosecution witnesses on this point.

The other submission that was made by learned President's Counsel was the failure of the learned High Court Judge to consider the defence evidence, specially the evidence given by the accused-appellant, before he decided to sustain the conviction of the accused-appellant. Counsel contended that there was complete failure by the High Court Judge to consider the evidence given by the defence. In support of this submission, learned Counsel cited the case of *The King v. Tholis Silva,*[1] where it has been held that it is the duty of a Court to scrutinize the defence put forward in a case and if it is rejected, to give reasons therefor. Counsel also referred to the case of *Chandrasena and Others v. Munaweera,*[2] where the need for a Judge to analyse and evaluate the evidence of both the prosecution and the defence with reasons has been highlighted and commented upon.

In this case, it is to be observed that the learned High Court Judge makes no reference at all to the defence evidence in his judgment. The failure to consider the defence evidence was a serious injustice done to the accused-appellant who had taken up the position that he was not at the scene, when the attack on the injured took place. It is to be remembered that when evidence is presented by an accused person in his defence, it is the duty of the Judge to consider it however weak that defence may be, before deciding whether the prosecution has succeeded in proving the case against the accused. On the other hand, if the High Court Judge decided to reject the evidence of the defence (accused-appellant) he should say so, giving reasons. Therefore, as submitted by learned President's Counsel, the failure of the learned High Court Judge to give due consideration to the defence evidence is fatal to the conviction of the accused-appellant in this case.

For the aforesaid reasons, I answer the second question of law raised in this appeal in the affirmative and in view of my final order, I refrain from answering the first question of law as it would now be a matter for the learned Magistrate to decide. Accordingly, I set aside the conviction and the sentence imposed on the accused-appellant. However, in the interests of justice, I direct that a – *de novo* – fresh trial be held against the accused-appellant before the present Magistrate of Panadura on the count he was found guilty. I have seriously considered the question, whether it would be right to place the accused-appellant in peril for the second time after a lapse of several years, but the circumstances of this case do not warrant me to take any other view. Therefore, the appeal is allowed but a retrial is ordered. 150

FERNANDO, J. – I agree.

ISMAIL, J. – I agree.

Appeal allowed.

Retrial of the appellant on count 1, by the Magistrate directed.